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No. 80-1923

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

TOMMIE L. FULKS,
Petitioner,

versus

AVONDALE SHIPYARDS, INC.,
and
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, U.S. DEPARTMENT OF LABOR,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals For the Fifth Circuit

BRIEF IN OPPOSITION TO A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether Fulks is mistaken in his assertion that under the Longshoremen's & Harbor Workers' Compensation Act questions of fact which present diametrically opposed evidence must be resolved in the worker's favor?

STATEMENT OF PARTIES

Under Rule 21.1(b) and Rule 28.1, counsel for Avondale Shipyards, Inc. certifies that the following are parties to this proceeding:

Tommie L. Fulks, Petitioner

Avondale Shipyards, Inc., Respondent

Director, Office of Workers' Compensation Programs, U.S. Department of Labor

Ogden Corporation, parent corporation of Avondale Shipyards, Inc.

JOHN O. CHARRIER, JR.

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JURISDICTION

This brief in opposition to Fulks' petition for writ of certiorari was filed within the enlarged time period granted by this Court pursuant to Rule 29.4.

STATEMENT OF THE CASE

Fulks initiated this action with the filing of Form BEC-203 on October 12, 1971. On that form, Fulks complained of having suffered injury by industrial disease and particularly having contracted an atypical tubercular condition from his employment.

Fulks has had various periods of employment with Avondale. He first worked for Avondale in 1951 for a short period of time. In 1952, he was rehired by Avondale and he continued his employment until July of 1964. He was again hired by Avondale in May of 1966.

In September of 1966, while employed by Avondale, Fulks was admitted to the Veterans Hospital, New Orleans, Louisiana, for treatment. He was not discharged from the hospital until February of 1967. Soon after his admission, he was found to be suffering from tuberculosis, which is more particularly described as atypical tuberculosis. After discharge from the hospital, Fulks returned to his employment in March of 1967 and worked for another employment period of approximately two months when he fell ill again.

During this period of illness, which lasted until March of 1968, Fulks was treated as an outpatient at the Veterans Hospital. In March of 1968, he returned to work for Avondale for another period of employment and worked regularly until August of 1968 when he fell ill again and was readmitted to the hospital. After a short stay in the hospital on this occasion, he was discharged; since that time, Fulks has not returned to work for Avondale and for a number of years has drawn Social Security benefits.

Fulks has sought compensation for his condition under the Longshoremen's & Harbor Workers' Compensation Act, 33 U.S.C.A. 901, et seq. Avondale has maintained that the Act is not applicable to this case and even if it is, the claim is not within the statutory time requirements of the Act.

SUMMARY OF ARGUMENT

The mere fact that Fulks is a workman bringing suit under the Act does not mean questions of fact which present opposing evidence must be resolved in his favor. The presumption created by the Act in favor of workers is rebuttable by the presentation of substantial evidence. This Court has clearly established that findings of fact by an Administrative Law Judge when supported by substantial evidence are beyond the scope of judicial review. Fulks' petition for a review of the Administrative Law Judge's findings of fact is without merit.

ARGUMENT

Fulks is unequivocally wrong in his assertion that under the Longshoremen's & Harbor Workers' Compensation Act all questions of fact which are diametrically opposed, according to the evidence presented, must be resolved in his favor.

It is without any logical or sound legal basis that Fulks contends all questions of fact which present opposing evidence must be resolved in his favor based only upon his status as a workman bringing suit under the Act. The result would effectively destroy any Administrative Law Judge's finding of fact not in favor of the workman whenever there was evidence in controversy. This was simply not the intent of Congress when it established the Act, nor has it been interpreted by this Court in the manner advocated by Fulks.

The petitioner's argument is based upon a misunderstanding of the presumption created by Section 20(a) of the Act. The presumption created by the Act is not, as the petitioner asserts, conclusive in nature, but rather is rebuttable by "substantial evidence" presented by the employer. Once the employer rebuts the presumption with substantial evidence and once a finding is so made by the Administrative Law Judge, as in the instant case, the burden then shifts on appeal to the claimant to show that substantial evidence does not support the Administrative Law Judge's decision. *Cardillo v. Liberty Mutual Insurance Co.*, 330 U.S. 469 (1947).

Further, the Supreme Court of the United States has firmly established that in proceedings under the Act, the findings of fact of the Deputy Commissioner which are supported by substantial evidence are beyond the scope of permissible judicial review. In the pre-1972 amendments to the Act, this Court held that all administrative findings of the Deputy Commissioner were to be accepted unless they were not supported by substantial evidence on the record considered as a whole. *Avondale Marine Ways, Inc. v. Henderson*, 346 U.S. 366 (1953); *Voris v. Eikel*, 346 U.S. 328 (1953); *O'Leary v. Brown-Pacific-Maxon, Inc.*, 340 U.S. 504 (1950). Although there has been disagreement in the circuits after the 1972 amendments concerning acceptance of administrative findings as to questions of law, the circuits have been uniform and united in acknowledging a continued duty to accept administrative findings of fact when supported by substantial evidence. *Jacksonville Shipyards v. Perdue*, 539 F.2d 533 (5th Cir. 1976), vacated, 433 U.S. 904, adhered to on remand, 575 F.2d 79; *Pittston Stevedoring Corp. v. Dellaventura*, 544 F.2d 35 (2d Cir. 1976), aff'd 432 U.S. 249 (1976); *Stockman v. John T. Clark & Son, Inc.*, 539 F.2d 246 (1st Cir. 1976), cert. den. 433 U.S. 908 (1976); *Alabama Drydock & Shipbuilding Co. v. Kininess*, 554 F.2d 176 (5th Cir. 1977), cert. den., 434 U.S. 903 (1977). Clearly, Fulks' request for review of the Administrative Law Judge's findings of fact is inappropriate.

CONCLUSION

Respectfully, Fulks' petition for writ of certiorari should be denied because the Administrative Law Judge's findings of fact are supported by substantial evidence, as found by the Benefits Review Board as well as the Fifth Circuit Court of Appeals, and are thus beyond the scope of judicial review.

Respectfully submitted,

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CERTIFICATE

I hereby certify that three copies of the above and foregoing has been sent to opposing counsel of record, by depositing same in U.S. Mail, postage prepaid, this ____ day of June, 1981.

I further certify that all parties required to be served have been served.

JOHN O. CHARRIER, JR.